Trinity Term
[2016] UKSC 31
On appeal from: [2014] EWCA Civ 279

JUDGMENT

Taiwo (Appellant) *v* Olaigbe and another (Respondents)

Onu (Appellant) *v* Akwiwu and another (Respondents)

before

Lady Hale, Deputy President
Lord Wilson
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

22 June 2016

Heard on 20 and 21 April 2016

Appellant (Taiwo)
Robin Allen QC
Christopher Milsom
(Instructed by Anti Trafficking and Labour Exploitation)

Respondent (Olaigbe)
Thomas Linden QC
Sarah Hannett
(Instructed by Lewis Silkin LLP (Oxford))

Appellant (Onu)
Robin Allen QC
James Robottom
(Instructed by Anti Trafficking and Labour Exploitation)

Respondent (Akwiwu)
Sami Rahman
David Mold
(Instructed by BH Solicitors)

LADY HALE: (with whom Lord Wilson, Lord Reed, Lord Hughes and Lord Toulson agree)

1. The mistreatment of migrant domestic workers by employers who exploit their employees' vulnerable situation is clearly wrong. The law recognises this in several ways. Depending on the form which the mistreatment takes, it may well amount to a breach of the worker's contract of employment or other employment rights. It may also amount to a tort. It may even amount to the offence of slavery or servitude or forced or compulsory labour under section 1 of the Modern Slavery Act 2015 or of human trafficking under section 2 of that Act. If a person is convicted of such an offence and a confiscation order made against him, the court may also make a slavery and trafficking reparation order under section 8 of the Act, requiring him to pay compensation to the victim for any harm resulting from the offence. But such orders can only be made after a conviction and confiscation order; and remedies under the law of contract or tort do not provide compensation for the humiliation, fear and severe distress which such mistreatment can cause.

2. Such a remedy could be found if the employer's conduct amounts to race discrimination under the Equality Act 2010 or its predecessor the Race Relations Act 1976. This would have the added advantage that proceedings for the statutory tort of race discrimination can be brought in an employment tribunal, at the same time as proceedings for unpaid wages and other breaches of the contract of employment and for unfair dismissal. The issue in this case, therefore, is whether the conduct complained of amounts to discrimination on grounds of race. In both the 1976 and 2010 Acts, at the relevant time, the definition of race also covered nationality and ethnic or national origins. In the two cases before us, the employment tribunals both found that the reason for the employers' mistreatment of their employees was their victims' vulnerability owing to their precarious immigration status. The principal question for this court, therefore, is whether discrimination because of, or on grounds of, immigration status amounts to discrimination because of, or on grounds of, nationality. The subsidiary question is whether the employers' conduct amounted to indirect discrimination against persons who shared that nationality.

Ms Taiwo's case

3. Ms Taiwo is a Nigerian national of Yoruba and Nigerian ethnicity. She is married and has two children but was living in poverty in Nigeria. She entered the United Kingdom lawfully in February 2010 with a migrant domestic worker's visa obtained for her by Mr and Mrs Olaigbe, her employers. Mr Olaigbe is also a

Nigerian of Yoruba ethnicity, but comes from a wealthy and influential family. Mrs Olaigbe is a Ugandan. They have two children (and at the time were also fostering two other children). They had "manufactured a history" of Ms Taiwo's previous employment with Mr Olaigbe's parents so that she would qualify for a domestic worker's visa. They had also "fabricated" a contract of employment, which Ms Taiwo never saw, and which provided for more favourable terms of employment than Ms Taiwo had understood. On arrival in the United Kingdom, Mr Olaigbe took her passport and kept it.

4. The employment tribunal found that Ms Taiwo was expected to be "on duty", during most of her waking hours and was not given the rest periods required by the Working Time Regulations 1998 (SI 1998/1883). She was not paid the minimum wage to which she was entitled under the National Minimum Wage Act 1998. For April, May and June 2010, she was paid the sum of £200 per month which she had been promised, and there was a further payment of £300 in August. But in October she was forced to hand over £800 to the employers. She was not given enough to eat and suffered a dramatic loss of weight. She was subjected to both physical and mental abuse by Mr and Mrs Olaigbe and Mr Olaigbe's mother, who was living with them for some of the time. She was slapped and spat at; she was mocked for her tribal scars and her poverty, and called a "crazy woman". She was not allowed her own personal space and shared a room with the employers' two children. The Employment Appeal Tribunal characterised her situation as "systematic and callous exploitation".

5. Eventually, through a sympathetic worker at the children's playgroup, she was put in touch with social services and other agencies. These enabled her to escape in January 2011 and supported her thereafter. In April 2011 she brought a claim in the employment tribunal. In January 2012, the tribunal upheld her claims under the National Minimum Wage Act 1998, for unlawful deduction from wages under section 13 of the Employment Rights Act 1996, for failure to provide the rest periods required by the Working Time Regulations 1998 and for failure to provide written terms of employment under section 1 of the 1996 Act. In February she was awarded £30,458.85 under the National Minimum Wage Regulations, £1,520 for failure to provide written particulars of her contract of employment, and £1,250 for failing to provide rest periods.

6. However, the employment tribunal dismissed her claims of direct and indirect race discrimination under the Equality Act 2010 (in fact some of her employment was covered by the Race Relations Act 1976, as the relevant provisions of the Equality Act 2010 only came into force on 1 October 2010, but it makes no material difference). The tribunal found that Ms Taiwo was treated as she was because "she was a vulnerable migrant worker who was reliant on the respondents for her continued employment and residence in the United Kingdom". She had not been treated as she was because she was Nigerian. Another migrant worker whose

employment and residence in the United Kingdom was governed by immigration control and by the employment relationship would have been treated in the same way. Mr and Mrs Olaigbe might have chosen to employ a Ugandan and there was no reason to think that a Ugandan would have been treated any more favourably than Ms Taiwo had been. Hence there was no direct discrimination on grounds of race.

7. The Employment Appeal Tribunal upheld the employment tribunal's conclusions on direct discrimination. They found that the tribunal had not properly approached the claim of indirect discrimination, because it had not tried to identify the "provision, criterion or practice" (PCP) which put the group to which the claimant belonged at a comparative disadvantage; but no tenable PCP had been put forward. Hence the appeal on discrimination was dismissed.

Ms Onu's case

8. The facts of Ms Onu's case are similar. She too is Nigerian. She entered the United Kingdom in July 2008 on a domestic worker's visa obtained for her by her employers, Mr and Mrs Akwiwu. She had previously worked for them in Nigeria, but they too had supplied false information to the United Kingdom authorities in order to obtain the visa. Mrs Akwiwu's mother later drafted a contract for her in Nigeria which provided that she would neither leave nor abscond from them within a year and that if she did she would be reported to the UK police and immigration authorities. They had taken away her passport on arrival and did not tell her where it was kept. She was not provided with a written statement of her terms and conditions of employment. She was required to work, on average, for 84 hours a week, looking after the home and the couple's two children, one of whom was a prematurely born baby who required special care. She was not given the required rest periods or annual leave. She was not paid the minimum wage. She was threatened and abused by her employers. She was told that she would be arrested and imprisoned if she tried to run away. She was also told that the police in the United Kingdom were not like the Nigerian police, by which was meant that she would be arrested and put in prison for minor matters. She was not registered with a general practitioner.

9. Ms Onu fled her employers' home in June 2010, walking some eight miles to the home of a Jehovah's Witness whom she had met on the doorstep of the home because she had no money. She was put in touch with a charity which assists trafficked migrant workers. In September 2010 she brought proceedings making the same claims that Ms Taiwo made, to which she later added claims for harassment and victimisation under the Equality Act 2010. The employment tribunal upheld the same claims as had the tribunal in Ms Taiwo's case and also held that Ms Onu had been constructively and unfairly dismissed. They further held that her employers

had directly discriminated against her and had harassed her on grounds of race. They found that the employers had treated her less favourably than they would have treated someone who was not a migrant worker. They had treated her in the way that they did because of her status as a migrant worker which was "clearly linked" to her race. At the later remedy hearing, she was awarded £11,166.16 for unfair dismissal, including the failure to provide a statement of terms and condition; £43,541.06 for unpaid wages; £1,266.72 for unpaid holiday; and £25,000 for injury to feelings and £5,000 aggravated damages.

10. The Employment Appeal Tribunal allowed the employers' appeal in respect of the discrimination claim. They held that no part of the employers' treatment of Ms Onu was inherently bound up with her race but rather with her subordinate position and the relative economic benefits of her work in the United Kingdom compared with the poverty of her situation in Nigeria. They also rejected a claim for indirect discrimination based on a PCP of "the mistreatment of migrant domestic workers", because it was not a neutral criterion which disadvantaged some of those to whom it applied disproportionately when compared with others to whom it applied.

The Court of Appeal

11. The Court of Appeal heard the appeals of Ms Taiwo and Ms Onu on the discrimination issues together: [2014] EWCA Civ 279; [2014] 1 WLR 3636; [2014] ICR 571. On the direct discrimination claim, there were two issues: the "grounds" issue and the "nationality issue". On the grounds issue, the court held that this was not a case in which the employers had published or applied a discriminatory criterion (an example would be that women required higher qualifications for employment than did men). It was therefore necessary to examine the employers' mental processes to discover whether the employees' immigration status formed part of the reasons for treating them so badly. It did not have to be the sole reason as long as it played a significant part. In this case it did so. That holding is not under appeal. On the nationality issue, the court held that immigration status was not to be equated with "nationality" for the purpose of the Race Relations and Equality Acts. There were many non-British nationals working in the United Kingdom who did not share the particular dependence and vulnerability of these migrant domestic workers. On the indirect discrimination claim, the court found that the mistreatment of migrant workers was not a PCP. This factual situation had nothing to do with the kind of mischief which indirect discrimination is intended to address.

12. Ms Taiwo has permission to appeal to this court on the nationality issue. Ms Onu's case has been heard with hers as an application for permission to appeal with appeal to follow if permission is granted. In view of the importance of the issue, permission to appeal is granted. The court is particularly grateful to counsel for

appearing for Mr and Mrs Akwiwu at very short notice, following the tragic and untimely death of Mr Jake Dutton who had represented them in the Employment Appeal Tribunal and the Court of Appeal. We are also grateful to counsel and their instructing solicitors for appearing pro bono for both Mr and Mrs Olaigbe and Mr and Mrs Akwiwu. Given that the Anti Trafficking and Labour Exploitation Unit is, quite properly, supporting the claims of Ms Taiwo and Ms Onu, it was particularly important that the contrary arguments were also fully presented to the court.

Direct discrimination

13. Section 13(1) of the Equality Act 2010 provides that "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". By section 4 of the Act, race is a protected characteristic. By section 9(1) race "includes (a) colour, (b) nationality, and (c) ethnic or national origins". By section 39(2), "An employer (A) must not discriminate against an employee of A's (B) (a) as to B's terms of employment, (b) in the way A affords B access, or by not affording access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service, (c) by dismissing B, (d) by subjecting B to any other detriment." The previous provisions of the Race Relations Act 1976 were to the same effect.

14. There can be no doubt that the conduct of these employers would amount to unlawful direct discrimination if it was "on racial grounds" (under the 1976 Act) or "because of" race (under the 2010 Act), which includes nationality. These employees were treated disgracefully, in a way which employees who did not share their vulnerable immigration status would not have been treated. As the employment tribunals found, this was because of the vulnerability associated with their immigration status. The issue for us is a simple one: does discrimination on grounds of immigration status amount to discrimination on grounds of nationality under the 1976 and 2010 Acts? On the face of it, the two are different. What basis is there for saying that they are the same?

15. Mr Robin Allen QC, who has said all that could possibly be said on behalf of the appellants, makes two basic points. First, he argues that immigration status is a function of nationality. It is indissociable from it. British nationals have a right of abode here which cannot be denied. All non-British nationals are potentially subject to immigration control. They require leave to enter and leave to remain. These can be granted for limited periods and on limited terms. Even those granted indefinite leave to remain may have that status withdrawn.

16. Secondly, he points to the flexible approach which has been adopted to the concept of nationality in other contexts. Thus, article 14 of the European Convention

on Human Rights forbids discrimination in the enjoyment of the convention rights on "any ground such as … national or social origin … or other status". In *R (Morris) v Westminster City Council* [2005] 1 WLR 865, it was held incompatible with article 14 of the European Convention on Human Rights, read with article 8, to deny a priority need for accommodation on the ground that a non-British child was subject to immigration control while her British mother was not.

17. By section 28 of the Crime and Disorder Act 1998, an offence is racially aggravated if the offender shows at the time, or is motivated by, hostility towards members of a racial group to which the victim belongs or is assumed to belong. By section 28(4) a racial group means "a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins". In *Attorney-General's Reference (No 4 of 2004)* [2005] EWCA Crim 889; [2005] 1 WLR 2810, calling a doctor an "immigrant doctor" was enough to establish that an assault was racially motivated: the epithets "Indian" and "immigrant" were both "clearly referable to his nationality and national origins". In *R v Rogers* [2007] 2 AC 62, it was held that calling people "bloody foreigners", although without reference to a specific nationality, amounted to racially aggravated abuse.

18. Mr Allen also points out that the United Kingdom Border and Immigration Agency's Code of Practice, *Prevention of Illegal Working, Guidance for Employers on the Avoidance of Unlawful Discrimination in employment practices while seeking to prevent unlawful working* (2008), gives as an example of direct discrimination on racial grounds, giving an employee with limited leave to remain more degrading forms of work in comparison with employees with unlimited leave (para 3.2).

19. None of these examples is very helpful in deciding the issue which we have to decide. Article 14 of the ECHR contains an open-ended list of characteristics which may result in unjustified discrimination in the enjoyment of the rights protected by the Convention, ending in "other status". Foreign residence has been held to be a status for this purpose, so it is quite clear that immigration status also qualifies. There was no need to distinguish between this and nationality in the *Morris* case and so the fact that it was regarded as nationality discrimination is neither here nor there. The courts were not required to address their minds to the difference, if any, between the two, as we are here.

20. Similarly, when deciding whether an offence is racially aggravated for the purpose of the 1998 Act, the distinction is unlikely to be relevant. "Bloody foreigners" is in any event a reference to nationality. *Attorney General's Reference (No 4 of 2004)* is closer to this case, but it is easy to justify a liberal approach to a statute which recognises that some forms of criminal behaviour are more hurtful to the victim and more damaging to society than others. The courts had recognised this in their sentencing policies before the 1998 Act was enacted.

21. The Equality Act 2010, and its predecessors, are very different. Generally speaking, the suppliers of employment, accommodation, goods and services are allowed to choose with whom they will do business. There is freedom to contract, or to refuse to contract, with whomever one pleases. The 2010 Act limits that freedom of contract (and also the freedom of suppliers of public services). It does so in order to protect specified groups who have historically been discriminated against by those suppliers, shut out of access to the employment, accommodation, goods and services they supply, for irrelevant reasons which they can do nothing about. In that context, the dividing line between which characteristics are protected and which are not protected is crucial.

22. Parliament could have chosen to include immigration status in the list of protected characteristics, but it did not do so. There may or may not be good reasons for this - certainly, Parliament would have had to provide specific defences to such claims, to cater for the fact that many people coming here with limited leave to remain, or entering or remaining here without any such leave at all, are not allowed to work and may be denied access to certain public services. So the only question is whether immigration status is so closely associated with nationality that they are indissociable for this purpose.

23. Mr Allen is entirely correct to say that immigration status is a "function" of nationality. British nationals automatically have the right of abode here. Non-British nationals (apart from Irish citizens) are subject to immigration control. But there is a wide variety of immigration statuses. Some non-nationals enter illegally and have no status at all. Some are given temporary admission which does not even count as leave to enter. Some are initially given limited leave to enter but remain here without leave after that has expired. Some continue for several years with only limited leave to enter or remain. Some are allowed to work and some are not. Some are given indefinite leave to remain which brings with it most of the features associated with citizenship.

24. In these cases, Ms Taiwo and Ms Onu had limited leave to enter on domestic workers' visas. It was the terms of those visas which made them particularly vulnerable to the mistreatment which they suffered. At the relevant time, such visas were granted to workers who had already been working abroad for the employer, or the employer's family, for at least a year; typically they would be granted for a year, though renewable; and the employee would have to seek the approval of the immigration authorities for any change of employer while here. In practice, therefore, such workers were usually dependent upon their current employers for their continued right to live and work in this country.

25. The Independent Review of the Overseas Domestic Workers Visa (2015), commissioned by the Home Office, identified ten reasons for these workers'

particular vulnerability: their motivation and mentality is one of desperation, born of their inability to find work or earn enough to support their families in their home country (sometimes having left that country to work elsewhere before being brought to this country); they are without the safety net of friends and family and other support networks; they are often unfamiliar with the culture and language, which represents a significant barrier to wider social interaction; they often work long hours; they often do not know their legal rights; they mainly work in private homes, which are less easy to regulate; their work is often part of an informal economy, paid in cash and not declared to the tax authorities; their permission to be here depends upon their employers' want or need of them; they have no recourse to public funds; and those employed by diplomats may have to combat claims of diplomatic immunity. Those, like the claimant in *Hounga v Allen* [2014] 1 WLR 2889, who have come here as visitors without permission to work and stayed here illegally, are even more vulnerable.

26. Clearly, however, there are many non-British nationals living and working here who do not share this vulnerability. No doubt, if these employers had employed British nationals to work for them in their homes, they would not have treated them so badly. They would probably not have been given the opportunity to do so. But equally, if they had employed non-British nationals who had the right to live and work here, they would not have treated them so badly. The reason why these employees were treated so badly was their particular vulnerability arising, at least in part, from their particular immigration status. As Mr Rahman pointed out, on behalf of Mr and Mrs Akwiwu, it had nothing to do with the fact that they were Nigerians. The employers too were non-nationals, but they were not vulnerable in the same way.

27. That, in my view, is enough to dispose of the direct discrimination claim. But it is consistent with the approach of this court in the cases of *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783, which in turn applied the approach of the European Court of Justice in the cases of *Schnorbus v Land Hessen* (Case C-79/99) [2000] ECR I-10997 and *Bressol v Gouvernement de la Communauté Française* (Case C-73/08) [2010] 3 CMLR 559, and *Preddy v Bull* [2013] 1 WLR 3741. These were cases, not about whether a particular characteristic fell within the definition of a protected characteristic in the 2010 Act, but about whether the conduct complained of amounted to direct or indirect discrimination. There was no doubt that it was one or the other.

28. *Patmalniece* was about whether a residence requirement, which all British nationals, but not all non-British nationals, could meet was directly discriminatory on grounds of nationality. In *Schnorbus*, Advocate General Jacobs had said this (para 33):

> "The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex of necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected."

This concept of indissociability was taken up by Advocate General Sharpston in *Bressol*, where the facts were very similar to those in *Patmalniece*, and formulated thus (at para 56):

> "I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification."

In all three cases, the discrimination was held to be indirect rather than direct (the Court of Justice disagreeing with the Advocate General in *Bressol*). There was not an exact correspondence between the advantaged and disadvantaged groups and the protected characteristic, as some of those distinguished by their nationality were not disadvantaged, although others were.

29. The same approach was adopted in *Preddy v Bull*, where Christian hotel keepers would deny a double bedded room to all unmarried couples, whether of opposite sexes or the same sex. That would undoubtedly have been indirect discrimination, as same sex couples were not then able to marry and thus fulfil the criterion, whereas opposite sex couples could do so if they chose. But the majority held that it was direct discrimination, because the hotel keepers expressly discriminated between heterosexual and non-heterosexual married couples. The couple in question were in a civil partnership, which for all legal purposes is the same as marriage.

30. Mr Allen argues that these cases can be distinguished, because they were cases in which an express criterion was being applied, be it nationality or heterosexuality, whereas these appeals are not concerned with such a criterion or test, but with the mental processes of the employers. But that makes no difference. In "mental processes" cases, it is still necessary to determine what criterion was in fact being adopted by the alleged discriminator - whether sex, race, ethnicity or whatever - and it has to be one which falls within the prohibited characteristics. The point about this case is that the criterion in fact being adopted by these employers

was not nationality but, as Mr Allen freely acknowledges, being "a particular kind of migrant worker, her particular status making her vulnerable to abuse".

Indirect discrimination

31. Mr Allen accepts that this is not a case of indirect discrimination. It is direct discrimination or nothing. In my view he is wise to do so, but the fact that these cases cannot be fitted into the concept of indirect discrimination is further support for the view that the mistreatment here was not because of the employees' race but for other reasons. Indirect discrimination is defined in section 19 of the 2010 Act thus:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and
> >
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

32. The concept in the 1976 Act was differently worded, but the basic principle is the same. An employer or supplier has a rule or practice which he applies to all employees or customers, actual or would-be, but which favours one group over another and cannot objectively be justified. Requiring all employees to sport a moustache is obviously indirectly discriminatory against women. The problem in

this case is that no-one can think of a "provision, criterion or practice" which these employers would have applied to all their employees, whether or not they had the particular immigration status of these employees. The only PCP which anyone can think of is the mistreatment and exploitation of workers who are vulnerable because of their immigration status. By definition, this would not be applied to workers who are not so vulnerable. Applying it to these workers cannot therefore be indirect discrimination within the meaning of section 19 of the 2010 Act.

33. In disclaiming any reliance on indirect discrimination in these cases, Mr Allen urges the court not to rule out the possibility that, in other cases involving the exploitation of migrant workers, it may be possible to discern a PCP which has an indirectly discriminatory effect. I am happy to accept that: in this context "never say never" is wise advice.

Conclusion

34. It follows that these appeals must fail. This is not because these appellants do not deserve a remedy for all the grievous harms they have suffered. It is because the present law, although it can redress some of those harms, cannot redress them all. Parliament may well wish to address its mind to whether the remedy provided by section 8 of the Modern Slavery Act 2015 is too restrictive in its scope and whether an employment tribunal should have jurisdiction to grant some recompense for the ill-treatment meted out to workers such as these, along with the other remedies which it does have power to grant.